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In the Supreme Court
OF THE
United States

October Term, 1966

No. 18

Utah Pie Company,
Petitioner,
vs.
Continental Baking Company, Carnation Company, and Pet Milk Company,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

I

PRELIMINARY STATEMENT

All respondents have refused to come to grips with this case. All have emphasized the evidence and inferences favorable to themselves. They have ignored unpleasant facts and the unpleasant law. They have fragmented and

belittled the evidence which they have been unable to ignore. Continental has gone so far as to cite and quote, as if it were evidence, the opinion of the Court of Appeals![1]

The question in this Court is not whether the opinion of the Court of Appeals supports respondents' position; neither is it whether reasonable men might have viewed the facts as the Court of Appeals viewed them. The question is whether there is evidence to support the *verdicts*—regardless of what contrary evidence there may be, and regardless of what conclusion the Court of Appeals might have reached if it, rather than the jury, had been entrusted with the task of judging credibility, and of sifting and weighing the evidence.

The answer to the real question, as shown by Utah Pie's Brief for the Petitioner (hereinafter "Utah Br.") is clearly "yes, the evidence supports the verdicts"; respondents' price discriminations were reasonably likely to substantially lessen competition and tended to create a monopoly, within the meaning of the Clayton Act. Significantly, none of the respondents has come to grips with the "incipiency" test of the Clayton Act, or with the numerous decisions of this Court construing that test.

A. Respondents Have Ignored the Controlling Facts.

Utah Pie set forth the evidence supporting the verdicts in its opening brief. The facts relied upon are firmly rooted in the record. They cannot be wished away. All

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[1]The "record" reference supporting the quotation on lines 8-9, page 10 of the Continental brief is to the opinion of the Court of Appeals, not the evidence.

that respondents have been able to do is to demonstrate that there was, and is, great conflict in the evidence and in the inferences which flow from it. The Court of Appeals to the contrary notwithstanding, all of the major factual issues were the subject of bitter conflict. They include, without limitation, the following:

—The assessment of respondents' pricing practices in light of the repeated testimony that their advertising allowances were *not* price cuts;

—The geographic extent of Utah Pie's area of effective competition, and the impact of respondents' discriminatory price-cutting upon it;

—The true reason why each respondent was willing to, and did, sell at a loss;

—The purpose and intent behind each respondent's price discriminations in the light of its expressions of purpose, the testimony of its officers, the duration and extent of its losses on frozen pie sales in Utah Pie's trading area, and sundry other evidence bearing upon its intentions;

—The probable effect, past, present and future, of each respondent's price discriminations upon Utah Pie and upon the "others" attempting to sell in Utah Pie's trading area;

In deciding these questions, the jury was faced with many subsidiary questions of credibility and weight to be given to particular items of evidence. For example, the jury had to decide:

—Whether to believe the testimony of wholesale buyers of frozen pies who said they figured pie prices on a

"per ounce" basis when two of those buyers turned down the opportunity to buy Utah Pie's 24 ounce product for 5 cents per case (10 cents per dozen) *less* than Continental's 22 ounce product;

—Whether and to what extent to believe the testimony of wholesale buyers whose employers could be found to be the recipients of price discriminations unlawful under Section 2(f) of the Robinson-Patman Act in the event that Utah Pie prevailed;

—Whether to believe any of the numerous self-serving statements of officers or employees of any of the parties to the litigation.

Respondents have not come to grips with any of these problems. Instead, they have re-argued all of their favorable evidence for the third time, apparently hoping that it will be more persuasive to this Court than it was to the jury. They have completely ignored the factual context in which the case must be decided, and the constitutional prohibition against re-examination of facts decided by a jury.

B. Respondents Have Ignored the Applicable Law.

As may be seen from the tables of cases in their briefs, all respondents have failed to so much as mention at least a dozen important decisions of this Court which Utah Pie has cited in its opening brief, and which are dispositive of this case.

Although all respondents have argued the "findings" of the Court of Appeals at length, none has mentioned either *White Motor Co. v. United States*, 372 U.S. 253, 83 S.Ct. 696, or *Poller v. Columbia Broadcasting System*,

368 U.S. 464, 82 S.Ct. 486, both recent, leading decisions on the respective roles of court and jury in antitrust cases.

Although all respondents deny that their discriminations were reasonably likely "substantially to lessen competition . . . or tend to create a monopoly . . .", no respondent has come to grips with *Brown Shoe Co. v. United States*, 370 U.S. 294, 329, 82 S.Ct. 1502, 1526, in which this Court held that the "incipiency" test is substantially the same under Sections 2(a), 3 and 7 of the Clayton Act. Pet and Carnation don't mention the case at all. Continental contents itself with a footnote describing Utah Pie's reliance upon *Brown Shoe* as "odd" (Cont. Br. 35).

By ignoring *Brown Shoe*, respondents save themselves the embarrassment of discussing the Clayton Act test of incipient threat to competition. Thus they make no mention of the leading Section 7 cases construing the "incipiency" standard: *United States v. Continental Can Co.*, 378 U.S. 441, 84 S.Ct. 1738 or *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 84 S.Ct. 1710 or *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715. Only Pet so much as mentions *United States v. Von's Grocery Co.*, 384 U.S. 270, 86 S.Ct. 1478 (Pet Br. 71). Only Carnation makes so much as passing reference (in a footnote) to *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S.Ct. 1665.

Respondents' treatment of this Court's decisions construing the Clayton Act "incipiency" standards in Section 3 cases is equally cavalier. No respondent mentions *Standard Oil Co. of California v. United States*, 337 U.S. 293, 69 S.Ct. 1051 or *International Salt Co. v. United States*,

332 U.S. 392, 68 S.Ct. 12 or *International Business Machines Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701.

Lest it be thought that respondents were saving their breath for a discussion of the leading cases under Section 2 of the Clayton Act—the very section here in issue—it should be noted that respondents have given this Court's opinions in Section 2 cases the same head-in-the-sand treatment which they have accorded to its decisions under Section 3 and Section 7 of the Act.

All respondents superimposed delivered-price price discriminations complained of by Utah Pie on top of chronic freight absorptions resulting in "mill net" price discriminations. None has mentioned *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961 nor *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 65 S.Ct. 971, reversing the Seventh Circuit. (Pet did, however, quote an FTC opinion quoting an earlier Seventh Circuit opinion in the *Staley* case, prior to its ultimate reversal. Pet Br. 67). Neither Pet nor Continental has mentioned *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793. Carnation implants it in the middle of a quotation from the book by Frederick M. Rowe (Carnation Br. 85), but makes no other comment.

Pet, which contends that it proved a "cost justification" defense (Pet Br. 48) doesn't mention *United States v. Borden Co.*, 370 U.S. 460, 82 S.Ct. 1309, unquestionably the definitive statement on what is and what is not adequate proof of a cost justification.

Carnation and Continental contend that "price cuts" and "advertising allowances" are in fact all price cuts (Carn. Br. 8-9, 27, 50-57; Cont. Br. 12). The evidence

on that point is discussed below. But neither cites this Court's discussion of the distinction between the subsections of Section 2 in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 79 S.Ct. 1005.

Pet and Carnation argue that since their pies (or some of them) were priced above Utah Pie's product, their price discriminations could not affect Utah Pie. But neither mentions *American Tobacco Co. v. United States*, 328 U.S. 781, 806, 66 S.Ct. 1125, 1137 in which this Court recognized that a price reduction on a higher-priced product may severely injure sales of a cheaper product simply by reducing the "spread." See also *Sun Oil Co. v. FTC*, 371 U.S. 505, 508, 83 S.Ct. 358, 361.

All respondents admit sales at a loss (at least on a fully-allocated cost basis) but deny business "buccaneering." None mentions *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, treating below-cost selling as evidence of "buccaneering." None attempts to distinguish the classic statement on sales below cost as evidence of predatory intent in *Ben Hur Coal Co. v. Wells*, 242 F. 2d 481, 486 (10th Cir. 1957) (quoted Utah Pie opening Br. 97). And none mentions this Court's classic exposition of the significance of intent in assessing the probable effect of trade practices in *Swift & Co. v. United States*, 196 U.S. 375, 25 S.Ct. 276.

This body of cases constitutes the law of the land. Respondents have made no attempt to explain why it does not control here and compel reversal. Their failure to discuss these cases is an eloquent admission that they simply cannot be distinguished.

Instead, respondents seem to have sought desperate refuge in a briar-patch of self-created "confusion." They raise and argue imagined "errors" upon which the Court of Appeals has not passed and which are not before this Court. They argue, variously, that Utah Pie is an incredibly inept, inefficient, ineffectual enterprise (Pet Br. 42; Cont. Br. 10) and that it is a prosperous, vigorous, healthy competitor (Pet Br. 86; Cont. Br. 10; Carn. Br. 73). They deny that sales below cost by multi-hundred-million-dollar corporations could injure little Utah Pie, but Carnation complains of the injury which Utah Pie has inflicted upon it by *non*-discriminatory sales *above* cost (Carn. Br. 86).

Utah Pie cannot hope to discuss all of the arguments and assertions in the over 320 pages of respondents' briefs, nor would that serve a useful purpose. Utah Pie has set forth the facts and the law which it believes compel reversal in its opening brief. The following discussion is limited to some particularly significant matters as to which respondents have taken liberties with the record or with the law.

II

THE EVIDENCE SUPPORTS UTAH PIE

Respondents have argued the evidence favorable to their respective positions. They have not come to grips with the evidence *favorable to Utah Pie* on any material issue. A comparison between the evidence relied upon by Utah Pie

and that relied upon by respondents demonstrates the extraordinary extent to which the Court of Appeals usurped the function of the jury.

A. An Advertising Allowance Is Still Not a Price Cut.

Pet now concedes that an advertising allowance is different from a price cut. It says:

> "A cooperative advertising allowance is an allowance made available to retailers, and differs from the off-invoice allowance which goes to wholesalers" (Pet Br. 26).

Carnation on the other hand, takes the position that price cuts and advertising allowances are the same, and that both must be deducted from list prices to obtain actual prices. (Carn. Br. 8-9, 27, 50-57).

Continental takes the position that advertising allowances are price cuts, at least in part (Cont. Br. 12).

Utah Pie relies upon the evidence that an advertising allowance is *not* a price cut, and that view supports the verdicts, as has been demonstrated in Utah Pie's opening brief.

The Court of Appeals took the exact opposite view (R. 1461, 1467, 1485, 1488).

What was the evidence? It included the following testimony:

> Chapman, Morton's broker:
>
> "Q. In any event, an advertising allowance is not a price cut?
>
> "A. No, it is not" (R. 160; See also R. 162).

Murphy, merchandise manager of the frozen food division of the Carnation Company:

"Q. . . . Are your advertising allowances fakes, or are they real?

"A. They are for real, believe me.

"Q. Okay. Then they aren't price cuts, are they?

"A. I didn't say they were price cuts. They are not a price cut" (R. 462; See also R. 110-112, 687-689, 1030).

A buyer testified that he considered advertising allowances to be price cuts *in part* (R. 716). And, of course, other witnesses said that advertising allowances *are* price cuts.

But a price cut requires absolutely no effort on the part of the purchaser; he simply pays the net price showing on the invoice. He is not required to advertise, and if he does advertise, he need not advertise by *brand* (R. 161, 697). He need not send in proof of having advertised (R. 110, 687, 1095). He need not wait for several months to receive payment of the allowance (R. 1030, 1031). He cannot lose its benefit by failing to "participate" (R. 689). He need not purchase in quantities large enough to justify an advertisement and the trouble and expense of collecting the advertising allowance.

From the seller's point of view, the advertising allowance buys "much better" advertising than the same amount of money would buy through an agency (R. 110).

The jury was fully justified in treating advertising allowances not as price cuts but as "side deals" for brand advertising. That view would be fully supported by the numerous decisions cited in Utah Pie's opening brief (Utah Br. 85-88).

B. The Court of Appeals Has Misconceived the Structure and Operation of the Wholesale Pie Market.

Like many other branded products, frozen pies are sufficiently "differentiated" so that price equilibrium may exist between major national brands at higher prices and lesser known brands at lower prices (See cases cited Utah Br. 83).

Price equilibrium in Utah Pie's frozen pie marketing area is clearly a more complex matter than it is in some other industries. In gasoline, for example, a fairly simple "major-minor" price equilibrium may exist, at least on a retail level. See *Sun Oil Co. v. FTC*, 371 U.S. 505, 508, 83 S.Ct. 358, 361.

Here, by contrast, price differences attributable to private labels and light weight pies interact with major-minor brand differences to produce a whole scale of prices at least on a wholesale level (D.Ex. A-35; R. 1065, 5827).

But the same general principle applies to frozen pies as to other differentiated products in competitive equilibrium: A price reduction on any product in the market will create disequilibrium, diverting business to the product upon which the price has been reduced unless other sellers in the market react by reducing their prices as well. Cf. *Sun Oil Co. v. FTC*, 371 U.S. 505, 83 S.Ct. 358; *Forster Mfg. Co. v. FTC*, 335 F. 2d 47 (1st Cir. 1964), cert. den. 380 U.S. 960; modified order on remand upheld 361 F. 2d 340 (1st Cir. 1966).

In this case, there is no "market price" for pies in Utah Pie's trading area in the sense that there is a market price for a listed common stock on a stock exchange or for a fungible commodity on a commodity market. At

higher prices, respondents sold fewer pies in Utah Pie's trading area; at lower prices, they sold more. Over a considerable range of prices, they sold (D.Ex. A-35; R. 1065, 5827).

Neither did respondents have a "market price" even for their own products. None of the respondents had a single price, available to all comers, at its plant door; all insisted upon quoting delivered prices, resulting in systematic discriminations satisfactory to themselves (R. 73, 451, 453, 740, 1028). Cf. *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793; *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 65 S.Ct. 961; *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 65 S.Ct. 971. Through the use of delivered prices, respondents were able to insulate themselves from the disciplining effect of an overall price reduction while chopping prices in the area where they competed with Utah Pie.

By controlling their prices, respondents were able to control their volume of sales. They set the prices low. Their prices were low in relation to their prices elsewhere. Their prices were low in relation to costs. To protect its volume of sales, Utah Pie lowered its prices. To protect its prices, it lost volume. Utah Pie had to—it had no place to go.

In short, the market for frozen fruit pies in Utah Pie's trading area was a complex economic model with many variables. It is not possible to know exactly what would have happened if respondents had charged non-discriminatory prices in that area, or if they had limited their discriminations to those defensible under Section 2 of the Clayton Act. Compare *Consolidated Foods Corp. v. FTC*,

380 U.S. 592, 598, 85 S.Ct. 1220, 1224, pointing out that in a merger case, "... once the two companies are united, no one knows what the fate of the acquired company would have been but for the merger."

Neither is it possible to trace price moves or shifts in market shares to specific acts of particular respondents; some of their price moves undoubtedly diverted volume, others undoubtedly forced Utah Pie to lower its prices, and some no doubt had both effects. One of respondents' price moves was met immediately—Continental's $2.55-$2.85 price in 1961. Other price moves were met over a period of time, as respondents' discriminatory pricing ate into Utah Pie's market share (Pl. Ex. 4; R. 67, 69, 1530; Pl. Ex. 93; R. 552, 4587).

But one fact is clear beyond any reasonable doubt: If respondents had charged non-discriminatory prices in Utah Pie's trading area, Utah Pie and the "others" in the market would have sold at higher prices, or sold more pies, or both. Respondents' discriminations could not help but have a depressing effect on prices, and could not help diverting volume sales to respondents. Their discriminations simply could not avoid having an adverse effect upon the sales and profits of Utah Pie and of the "others" attempting to sell in Utah Pie's trading area. And, if any were needed, there was direct testimony to that effect (R. 1055).

C. The Industry Was Highly and Increasingly Concentrated, Especially in Utah Pie's Trading Area.

Pet and Carnation argue that the evidence shows an unconcentrated industry full of vigorous competitors (Pet Br. 76-79; Carn. Br. 79-83). In fact, the evidence shows quite the contrary. It shows a very high degree of concentration, nationwide, particularly in the "quality" pie market, in the fiscal year July, 1958—June, 1959 (Pl. Ex. 61; R. 436, 602, 2275, 2294). At that time, the three respondents in this case dominated the larger "quality" segment of the market with well over ⅔ of all the business between them (Ibid.). Five sellers had about 80% of that part of the market (Ibid.). In the "price" pie market, Continental's Morton was the largest selling brand (Ibid.). Seven sellers had ⅔ of that segment of the market (Ibid.).

Respondents rely upon the testimony of Pet's Harsha, who said that the industry had grown from "15 or 20" companies in 1955 to "upwards of 200" at the time of trial (R. 1010-1011). From that, respondents deduce that the level of concentration in fiscal 1959, as shown by Pl. Ex. 61, was later reduced by new entry (Pet Br. 76-77; Carn. Br. 82).

But the jury was not required to believe Mr. Harsha. As a Pet executive, he was clearly an interested witness (R. 1008-1009). His credibility was expressly challenged (R. 1257).

Even if Harsha's testimony were to be believed on the subject of the *number* of manufacturers, it has little or no significance if the 180-odd companies which allegedly entered the industry between 1955 and the time of trial did not obtain any substantial market share. Harsha's

testimony also means nothing if the massive entry to which he testified took place in 1956, 1957 and 1958 (as would seem likely, in the light of Utah Pie's experience). If so, that entry is fully reflected in the fiscal 1959 market structure shown in Pl. Ex. 61 (R. 436, 602, 2275, 2294).

Harsha's testimony is in flat conflict with the evidence on market shares and concentration in Utah Pie's trading area. That evidence shows that in the immediate Salt Lake City area, the market share of all sellers other than parties to this suit diminished from 1959 to 1960 to 1961 (Pl. Ex. 62; R. 437, 2323). There was also a decline in the *number* of other sellers from 5 in 1960 to 4 in 1961 (R. 1104). The evidence also shows the highly sporadic appearances of "other" sellers as reflected in newspaper advertising (D.Ex. A-27; R. 893, 5824).

Although various brands are mentioned from time to time in the record, the names tend to be repeated over and over in different sequences which create a misleading impression of the number of identifiable competitors in the market. In many instances, a single packer probably accounts for several brand names. Mary Elizabeth, for example, is a Johnston second label (R. 725). Pictsweet is a Stokely label (R. 826). Stokely also packs for respondent Carnation in the midwest (R. 465). For all that the record shows, all of the brands referred to in the testimony, and not mentioned by name in Pl. Ex. 61, may have been included in the "all other" category in that exhibit (see Pl. Ex. 61; R. 436, 602, 2275, 2294).

In sum, the national concentration in the industry was very high in 1958-1959. The only evidence to suggest that concentration decreased thereafter is Harsha's interested

and highly equivocal testimony. There was a continual decrease in the market shares of the "other" sellers in Salt Lake from 1959 to 1960 to 1961. The market was highly concentrated in 1959, both nationally and in Salt Lake, and there is no reason to believe that there has been any substantial decrease in that concentration since.

D. Utah Pie's Marketing Area Included Denver and the Pacific Northwest.

The Court of Appeals rests its opinion upon its own analysis of the evidence on markets. It says "there are distinct frozen pie market areas in Los Angeles, San Francisco, Seattle, Portland, Salt Lake City, Phoenix, and Denver." (R. 1455). It defines the periphery of each such market as "nearly the same as that of the area in which its metropolitan newspapers circulate, that, because retail advertising is the lifeblood of the frozen pie industry and crucial to volume sales" (Ibid.).

These "findings of fact" are apparently based upon testimony about *retail* market areas—the areas in which retail stores can effectively reach their customers, and in which they compete with each other. Retail markets probably are limited by the area from which retailers may reasonably expect to draw customers into their stores.

But a manufacturer's market area is the area relevant to this case. And that is something else entirely (R. 728-729). A manufacturer does not advertise his pies in a local newspaper and wait for wholesale buyers to come in and buy—he goes out and calls upon his customers near and far (R. 531-542, 546, 564, 778). He may engage in national advertising (R. 1012-1013). The only practical limits upon his marketing area are his willingness to pay

the expenses of sending salesmen to distant places (or hiring brokers there) and the freight costs involved in shipping to distant customers.

Respondents have all demonstrated the potential market area of a single pie plant by acts more eloquent than any words. With 3 pie plants apiece, Pet and Continental have a marketing area consisting of the entire continental United States (R. 71-72, 1012-1013). Carnation, with only 2 plants, covers the nation west of the Mississippi (R. 465).

There was testimony showing that Washington, Oregon, Montana, Wyoming, and Colorado, including specifically Denver, were within Utah Pie's market area as a manufacturer (R. 531-542, 546, 755, 778, 1115-1116).

Utah Pie contended that respondents' discriminations (particularly Continental's) had excluded it, or at least drastically reduced its sales, in outlying portions of its trading area (R. 1236, 1241, 1256, 1268, 1269, 1274-1276, 1281). Respondents, and particularly Continental, reply that Utah Pie's sales efforts outside of Salt Lake City were feeble, and that no such exclusion was shown (Pet Br. 18; Cont. Br. 10, 23-25). The jury's precise conclusion on this point is, of course, not known. For purposes of this case, it is sufficient to note that there is evidence to support Utah Pie's view and thus the verdicts.

E. Continental Has Not Come to Grips With the Evidence.

Continental's argument for affirmance may be summarized as follows:

Utah Pie's case against it is limited to a two-week price reduction in Salt Lake City, which resulted in negligible

sales by Continental. The $2.55-$2.85 price which Continental charged on those sales was a result of Continental's manufacturing efficiency, was above direct cost, met but did not undercut Utah Pie's $3.10 price and was in any event non-discriminatory because Continental was offering advertising allowances elsewhere at the time of its price cut to $2.55 in Salt Lake. As for Denver, Utah Pie's claims based upon Continental's sales in that market were alternative, unsupported, and were waived at the close of the trial. As for the Pacific Northwest, Continental had no sales to speak of, did not charge discriminatorily low prices, and did not injure either Utah Pie or competition in general.

On these facts, says Continental, the law compels the conclusion that Continental has violated no law, "for to satisfy the statutory test '. . . there must be something more than an essentially temporary minimal impact on competition . . .' " (Cont. Br. 36-37).

The trouble with the argument is that it rests upon false factual premises from beginning to end, and upon an erroneous interpretation of the law.

1. Utah Pie's Entire Case Went to the Jury.

Utah Pie has shown that Continental charged discriminatory low prices in Utah *and* in Denver, after Utah Pie's initial success there, *and*, at times, in the rest of Utah Pie's trading area, including the Pacific Northwest. It asked the jury to " 'See these facts steadily and see them whole' " (R. 1282). The law requires no less. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 698, 82 S.Ct. 1404, 1410.

Continental Baking has, however, dismembered Utah Pie's case by treating the Denver evidence as if it were a separate and "alternative" claim (Cont. Br. 80). It argues that there is no evidence of low prices in the Pacific Northwest because, its prices there were, much of the time, high *in comparison with Denver* (Cont. Br. 20-22). There is no merit in any of these contentions; Continental engaged in significant price discriminations, to the injury of Utah Pie, in all of these areas. Considered as a whole, the evidence fully supports the jury's conclusion that Continental's discriminations posed an incipient threat to competition. It would have supported a damage verdict in favor of Utah Pie and against Continental greatly in excess of the verdict actually rendered.

2. The Impact of Continental's 1961 Price Raid in Salt Lake City Lasted for Several Months.

Continental argues that Utah Pie has at best a "two week case" against it for price discriminations in Salt Lake City (Cont. Br. 45). The record simply does not support that assertion.

Early in the trial, Continental's own counsel asked Continental's broker about the details of Continental's sales to Safeway's Salt Lake division at the $2.55-$2.85 price:

> "Q. How long, Mr. Chapman—let me start over by saying—do you know, Mr. Chapman how long 7,500 cases of apple pies lasted Safeway?
>
> "A. Well, I'd say pretty close to three weeks. I think that 15,000 cases lasted roughly five to six weeks.

"Q. So that these two sales that you made to Safeway so far as you know lasted Safeway six weeks?

"A. That's right" (R. 207).

The record shows that the offer of June, 1961, was made to Safeway on June 16 (Pl. Ex. 15; R. 104, 2061). It shows that a sale of 2,000 cases of apple pies to Grocers Wholesale in Salt Lake was shipped on June 30 (Pl. Ex. 14; R. 114, 2057). It shows that 600 cases of apple pie were shipped to Associated Food Stores in Pocatello on July 11 (Pl. Ex. 14; R. 114, 2057, 2058). It shows that the "deal" was renewed effective July 31 in Idaho, Utah and Western Montana and good until August 12 (Pl. Ex. 16; R. 113, 2062). Utah Pie continued its $2.75 price into August, 1961 (R. 829). Utah Pie's $2.75 price had been initiated on June 16 (R. 204-205).

3. The Evidence Shows Continental's Denver Discriminations.

Continental's analysis of the Denver evidence (Cont. Br. 22-26) begins with the intimation that Denver is not in the case, although the Pre-Trial Order expressly includes "Utah, Idaho, Washington, Oregon, Wyoming and *Colorado*" as "states in which the plaintiff markets its frozen pies" (R. 34; emphasis added).

During the trial, Utah Pie's sales manager testified about his sales efforts in Denver (R. 531 et seq.) and Utah Pie offered Continental invoices showing Continental's price discriminations in that market (R. 532). At first, Continental counsel objected to Continental invoices from Virginia, near Continental's Crozet, Virginia,

plant on the spurious ground that "the plant located in Virginia was not shipping into Denver" (R. 532).

When Utah Pie's counsel corrected him on that misstatement, Continental's counsel next objected on the grounds that Utah Pie's interrogatory answers had eliminated Denver from the case (R. 532-534). When reminded that the interrogatory answers had been amended to include Denver, Continental counsel lamely conceded that the issue had come up in connection with a motion for summary judgment several weeks before the trial (R. 537). Continental's objection was then watered down as follows: ". . . I see no reason to burden the record with all these invoices. That is all my concern is on that" (R. 537).

Thereafter, the Denver evidence continued to come in from a variety of witnesses throughout the trial. It may be summarized as follows:

Safeway leads all supermarket chains in the Denver area in terms of volume, and operates about 60 stores there (R. 759). King Soopers ranks second in volume of sales with 15 stores; after January, 1960, Red Owl had 14-19 stores, but there was "no comparison" with King Soopers in terms of volume (R. 759). Prior to January, 1960, Busley's Supermarket Company was a division of H. A. Marr Company in Denver (R. 742, 758). H. A. Marr sold out to Red Owl on January 1, 1960 (R. 758).

Of these major purchasers, "Red Owl is private label minded" (R. 751). It has many private labels (Ibid.). In addition, ". . . there is Safeway, of course, with their Bel Air brand much in existence" (Ibid.). In King Soopers, which ranks second in volume of sales, Continental's Morton was the leading brand of frozen pie (R.

753). Continental's Denver witness named Morton and Banquet as the two largest selling brands of frozen pies in Denver (R. 752). He said "beyond that, I'd be guessing" (Ibid.). Banquet and the three respondents in this case are the "big four" of frozen pie sales on a nationwide basis (Pl. Ex. 61; R. 436, 602, 2275, 2294).

Although Continental's Denver witness mentioned some other brands, they were necessarily of minor significance with the two biggest Denver chains (Safeway and King Soopers) carrying Pet-packed Bel Air and Continental's Morton, respectively. As in Salt Lake, there were considerably fewer sellers than there were brands, and only a tiny fraction of the legendary 200 pie companies in the United States were apparently able to sell in Denver with price conditions as they were (R. 745, 751).

Continental's Morton, however, enjoyed very substantial Denver sales, at steadily decreasing prices which Utah Pie has charted in detail in Appendix "C" to its opening brief (Utah Br. App. "C," pp. xxi-xxxviii). Appendix "C" shows that Continental's Denver sales prices in 1959 ranged between $3.93 and $3.65 for apple and cherry pies (Ibid.). Those prices dropped sharply to $3.35 in January of 1960, dropping to $2.91 for apple and $3.20 for cherry in July, 1960 (Ibid.). Commencing in February, 1961, Continental sold apple pies in Denver for $3.00 per dozen in every month through the filing of the complaint in this action except August (Ibid.). Continental sold cherry pies in Denver at $3.10 per dozen in February, March, April, May, July and September of 1961 (Ibid.).

These Denver prices were discriminatorily low in relation to prices in a number of other places where Conti-

nental was making substantially contemporaneous sales, as shown by Continental's own compilation of its offering (and, presumably, selling) prices (see table, Utah Br. 51, based upon Pl. Ex. 111; R. 627, 629, 4707). Note that the table shows case (*half* dozen) prices, while the invoices and Utah Br. App. "C" show prices per *dozen*.

Continental's Denver prices were even low in comparison to its prices in the Pacific Northwest, as shown by some of the invoices charted in Appendix "C."

Continental's Denver witness did not ascribe his failure to buy Utah Pie's products exclusively to Continental's pricing, but neither did he exclude it:

> "Q. Did Morton's price in 1960 cause you not to buy pumpkin and mince from the Utah Pie Company?
> "A. Not necessarily Morton's, but prices being offered on that market, yes.
> "Q. By the various manufacturers in the market?
> "A. Right" (R. 745).

There was evidence that Morton was a "price leader" in Salt Lake, despite its relatively small volume of sales (R. 804-805). Clearly, Morton was also a price leader in Denver, where it was one of two leading brands (R. 752-753).

Denver was definitely within Utah Pie's trading area, according to respondents' own economics expert (R. 1116). Continental's Denver witness said that Denver "evidently was" within plaintiff's trading area for truckload lots of frozen pies "from the price he quoted" (R. 755). The price plaintiff quoted in Denver was its Salt Lake price plus freight (R. 532). Utah Pie's plant was closer to

Denver than that of any respondent and had a freight advantage (R. 540-541, 754).

Utah Pie's sales efforts in Denver were substantial. First, Utah Pie's sales manager made several selling trips to Denver (R. 531). Then Utah Pie hired a broker in Denver, but let him go after he failed to produce any sales (Ibid.). In the fall of 1959, Utah Pie's sales manager went back again and contacted the major chain stores, including "King Supers, Safeways, Miller Supers, H. A. Marr, Furr Foods" (Ibid.).

At that time, Utah Pie obtained substantial orders—9600 cases in its fiscal 1959 (ended October 31, 1959) and 7900 cases in the weeks immediately following (R. 531). Thereafter, it was unable to make sales thereafter, despite ". . . repeated trips to Colorado contacting the chain stores, the buying groups, talking to the buyers. . . ." (R. 535).

Why was Utah Pie unable to make any further sales in Denver after late 1959? And why was Morton the largest selling brand in Denver's biggest volume chain after Safeway? And why was Continental's Morton one of the two largest selling brands in Denver?

Surely a jury could reasonably look to Continental's discriminatory pricing practices, particularly in and after January, 1960, for the answer to all of these questions.

4. There Is No Inconsistency in Utah Pie's Oregon and Washington Case Against Continental.

In its efforts to confuse and obscure, Continental has repeatedly accused Utah Pie of inconsistency, vacillation and worse (Cont. Br. 21, 78). In particular, Continental

has accused Utah Pie of taking an inconsistent position on Continental's pricing pattern in the Pacific Northwest states. There is inconsistency only if a "high" price area can never become a "low" price area at a later time, and only if there is no such thing as a *relatively* low or *relatively* high price.

The relationship of Continental's pricing in the Pacific Northwest first came up after Utah Pie's counsel offered the Continental invoices in evidence:

> "By Mr. Alioto:
>
> "Q. In 1958 you were not trying to compete in Oregon, were you?
>
> "A. No.
>
> "Mr. Schafer: Does that mean, Mr. Alioto, you withdraw the 1958 invoices?
>
> "Mr. Alioto: On the contrary, I want to show what your price was when he wasn't competing and what happened when he went into the market.
>
> "Mr. Schafer: I didn't understand the purpose of the last question.
>
> "Mr. Alioto: That was the purpose" (R. 543).

In January, 1960, Utah Pie's sales manager made a trip through the Northwest in the company of a broker from Portland (R. 538, 542). In February, 1960, Continental's Washington price for cherry pies went below $4.00 per dozen for the first time (Refs., Utah Br. App. "C," p. xxxiii). As recently as December, 1959, it had been $4.60 (Ibid., p. xxxii). In March, 1960, Continental's Washington price for apple pie dropped to $3.80 as against a consistent $4.28 in preceding months (Ibid., p. xxiv).

Thereafter, Washington prices continued quickly down, hitting $3.64 for apple and $3.63 for cherry in April, 1960

(Ibid., pp. xxv, xxxiv). At that point, Continental's Washington prices were still substantially above its contemporaneous prices in Denver of $3.35 for apple and $3.10 for cherry (Ibid., pp. xxv, xxxiv).

Then Continental's Washington price for cherry started back up, and by December, 1960, Continental was regularly selling its 22 ounce cherry pies in Washington for $4.00-$4.16 per dozen as against consistent Denver sales at $3.20 (Ibid., p. xxxv).

With apple pie, however, the story was quite different. After April, 1960, Continental's Washington price for apple sold between $3.64 and $3.80 until July, September, and October, when it bounced up to $4.16 (as against a consistent $3.20 in Denver) (Ibid., pp. xxv, xxvi). But in November, 1960, Continental's Washington price for apple plummeted to $3.34, still above the $3.20 Denver price (and a sale at $3.20 in Salt Lake) but dramatically below the $3.95 per dozen price at which Continental was continuously quoting (and presumably selling) in Arizona from July 4 through December 31, 1960 (compare Utah Br. App. "C," p. xxvi with table, Utah Br. 51, based on Pl. Ex. 111; R. 627, 629, 4707).

In early 1961, the same pattern prevailed, with Continental's 22 ounce *cherry* pie selling strongly in Washington at $4.00 to $4.16 as against a price of $3.10-$3.80 in Denver (Utah Br. App. "C," p. xxxvi). In May, 1961, Continental's Washington price for cherry dropped again to $3.34, and fluctuated from $3.34 to $4.16 until the first week of September (the month in which the complaint in this case was filed—R. 1365). In September, Continental's Washington price for a dozen 22 ounce cherry pies fell to

$3.04, lower even than a contemporaneous sale in Denver at $3.10 (Ibid., pp. xxxvi-xxxviii). By contrast, Continental's *lowest* full truck prices, after deduction of advertising allowances as well as actual price reductions, were $3.30 per dozen ($1.65 per case) in Phoenix, Los Angeles and San Francisco throughout the pre-complaint portion of 1961 (Pl. Ex. 111; R. 627, 629, 4707, 4708; R. 608-609, 627). For several months of that period the San Francisco and Los Angeles price was $4.00 (Ibid.).

Thus Continental's Washington *cherry* pie price was sometimes higher than its Denver price for that flavor, and sometimes roughly the same—i.e., low in relation to Continental's price outside of Utah Pie's trading area. In July, 1961, for example, Continental was selling cherry pie for $3.34 in Washington and Idaho, and $3.10 in Denver (Utah Br. App. "C," p. xxxvii). Throughout that month the San Francisco full truck price for cherry pie after deducting *all* "deals" was $4.00 per dozen ($2.00 per case) (R. 608, 609; Pl. Ex. 111; R. 627, 629, 4707, 4708).

With respect to *apple,* Continental's 1961 price pattern also shows a hierarchy of pricing—Washington sales generally in a range of $3.34 to $3.50 and occasionally higher, consistent Denver sales at $3.00 and the lowest prices of all, $2.55, $2.59, $2.61 and $2.89, in and around Salt Lake City (Utah Br. App. "C," pp. xxvii-xxix). Contemporaneous sales are shown by California invoices at $3.55, $3.76, $4.00 and $4.04 in June, July and August, 1961 (Ibid., pp. xxviii, xxix). Continental's full truck offering price for apple in Los Angeles was $4.00 from January through May (Pl. Ex. 111; R. 627, 629, 4707) and $4.00 in

San Francisco through July and the first 13 days of August (Ibid.).

If the jury saw these facts steadily, and saw them whole, it saw all-time low prices in Salt Lake City in the summer of 1961, following a long siege of discriminatory low prices in Denver, and extended periods of somewhat higher but still discriminatory prices in the Pacific Northwest—all against a background of still higher prices in Arizona and California. Continental's discriminations were chronic over a period of several years in important parts of Utah Pie's trading area, culminating in the spectacular $2.55-$2.85 price for Salt Lake City in the summer of 1961, presumably intended as the final *coup de grace* for Utah Pie. The "two week" case referred to by Continental is a myth.

5. The Jury Was Entitled to Disbelieve Continental's "Ounce-for-Ounce" Price Analysis.

Both Continental and Pet have urged that pie pricing should be analyzed on a price-per-ounce basis (Cont. Br. 17, 42; Pet Br. 81). That approach ignores the voluminous testimony that "a pie is a pie" and that the weight of a pie is not necessarily determinative of the price for which it can be sold, either at wholesale or at retail (R. 167-168, 702-703, 824-827, 1103, 1208). It ignores the commercial realty that frozen pies are sold by the "case" (6) or by the "dozen," not by the ounce. It ignores the fact that all of Continental's pies at issue in this case, both 22 ounce and 24 ounce, were stipulated to be of "like grade and quality" (R. 1349, 1385).

Continental argues that "every professional buyer testified that manufacturers' offers are evaluated on an

ounce-for-ounce basis, and there was *no* testimony to the contrary" (Cont. Br. 42). In support of this statement, Continental refers to the testimony of Chapman, its own broker (a former buyer) and buyers Henzke and Degenhart (Ibid., references to R. 220, 693, 712).

Chapman gave the lie to his own testimony, and that of Henzke and Degenhart, when he described his adventures with Continental's slashing price cut in 1961. Chapman testified that he signed up Degenhart's American Food Stores and Henzke's Safeway Stores for large quantities of Morton's 22 ounce pies (R. 163, 202-205). Both then learned that Utah Pie would sell its 24 ounce pies 5 cents *per case* cheaper than the Morton 22 ounce pies (R. 204-205).

Chapman then offered to cancel the American Food Stores order, but Degenhart told Chapman "that he knew that there was a lower price in the market but that he had given me the order and that he expected me to deliver the merchandise" (R. 205).

As for Safeway, it asked Chapman if he could come down five cents to the same *per case* price as Utah Pie was quoting on its heavier pie (R. 204-205). Since neither Chapman nor Morton's regional sales manager had pricing authority, and since they could not reach Continental's main office in New York, which had already closed for the weekend, they took it upon themselves to cancel the shipment to Safeway, and unload the trucks (R. 205, 207). When they reported their actions to the Safeway buyer, ". . . he said he was extremely sorry that we had cancelled the orders. . . ." (R. 205). The following Tuesday Continental sold Safeway 7,500 cases of 22 ounce pies at

a price *higher* than Utah Pie's price for 24 ounce pies (R. 204-206).

Utah Pie's sales manager did indeed testify that a light weight pie "should" sell for less than a heavier pie, in the abstract, and generally did, but he went on to point out that the opposite was sometimes true (R. 822-825, 880). If the ounce-for-ounce price theory were really valid, Pet's 20 ounce Swiss Miss would have been unsaleable at $3.20 in competition with 24 ounce pies at $3.10-$3.60. In fact, Swiss Miss sold briskly at $3.20 and up (D. Ex. A-35; R. 1065, 5827).

On this evidence, the jury was certainly not required to find that Continental's price of $2.55-$2.85 per dozen did not undercut Utah Pie's $3.10 per dozen price. Nor was it required to believe the testimony of buyers whose actions spoke louder than words.

The testimony of buyers who had been recipients of respondents' discriminatory prices could not, in any event, be classed as "disinterested" in view of their potential exposure under Section 2(f) of the Robinson-Patman Act.

6. Continental's Price Discriminations in Salt Lake City Directly and Proximately Injured Utah Pie.

Continental argues that Utah Pie over-reacted to its $2.55-$2.85 price (Cont. Br. 18-19). But was the jury *required by law* to treat Utah Pie's reaction as unreasonable in the circumstances? Within a few weeks, Continental sold 19,150 cases of apple pies in the heart of Utah Pie's trading area (R. 207; Pl. Ex. 12; R. 81, 2055; Pl. Ex. 14; R. 114, 2057, 2058; Pl. Ex. 103; R. 599, 4609, 4685). That represented 65% of all of the apple pies sold *in that whole*

year by Continental within the area covered by respondents' market-share study (D. Ex. A-35; R. 1065, 5827). Those sales clogged Safeway's storage for some 6 weeks (R. 207). And Continental's $2.55-$2.85 price was available to every buyer in the market (R. 163). For at least one buyer, Continental's price was $2.75 including freight cost (R. 839). Even after Utah Pie reacted by cutting its own price for 24 ounce pies to $2.75 per dozen, two major buyers spurned Utah Pie in favor of Continental's lighter-weight product (R. 204-206).

Continental further complains that Utah Pie's reaction to Continental's 1961 price cuts extended to Spokane (Cont. Br. 19). The argument is grotesque. As a matter of policy, Utah Pie tried to operate with an "f.o.b. plant" type of pricing system for both private label and advertised label pies (R. 831, 840-841). When it lowered its price, it lowered it to all purchasers (R. 828, 890-891). It would pack a private label at the same price for any buyer that wanted one (R. 818).

Continental also complains that Utah Pie reacted to its 1961 price cuts by lowering the price of the "Utah" label to the same level as Utah Pie's "Frost 'N Flame" (Cont. Br. 18-19). This is a curious and inconsistent position for Continental to take in light of its counterclaim, which was *founded* upon injury allegedly suffered by Continental as a result of Utah Pie's price differences (R. 30-31).

Continental may not be heard to complain because Utah Pie charged different prices for private label pies and at the same time to criticize Utah Pie for reacting to its price-cutting by adopting uniform prices. Insofar as

Continental has a counterclaim based upon Utah Pie's price differences, Continental has its new trial, and the matter is not in issue in this Court (R. 1526). Insofar as Continental is complaining that Utah Pie charged *uniform* prices, its argument is frivolous.

F. Pet's "Investment Spending" Program Was an Attempt to Monopolize.

Pet's defense to its particularly low prices in Utah Pie's trading area seems to be that Pet planned losses everywhere, and therefore the program was not aimed at Utah Pie in particular (Pet Br. 54). The trouble with that argument is twofold. First, Pet had *particularly* low prices in the Utah area (Pl. Ex. 2-, R. 377, 2178; Pl. Ex. 25; R. 378, 2179), and, second, its entire "investment spending" program was a thinly-veiled attempt to monopolize the entire frozen fruit pie business.

What was "investment spending?" It was "selling at a net loss over a substantial number of years in order to establish a franchise in the market place." (R. 1050-1051). By June, 1959, that program was well on its way to success (Pl. Ex. 61; R. 436, 2275, 2294). At that time, Pet was already the largest single factor in the market with its Pet-Ritz brand by a clear margin (Ibid.). Bel Air had an additional chunk of the market (Ibid.). At the time, Pet's Swiss Miss had not yet been introduced (R. 1028; D. Ex. A-35; R. 1065, 5827, 5843).

On this evidence, the jury could properly infer that Pet's "investment spending" program was calculated to wash the weaker companies (i.e. those which had to survive on their pie profits) right out of the market. In

view of the special treatment which Pet gave Utah Pie, the jury could well infer that Pet's discriminations in Utah Pie's trading area were designed to wipe out a pocket of resistance in Pet's relentless campaign for market dominance.

G. Respondents Did Not Prove That They Were Meeting Competitors' Prices in Good Faith.

Respondents argued that their discriminatory prices in Utah Pie's trading area were made in good faith to meet the equally low price of a competitor. The jury was clearly instructed that if that were true, it would be a "complete defense." (R. 1364). The jury found for Utah Pie.

The jury was also instructed that under appropriate circumstances, it could even find that sales at a loss were made in good faith to meet the equally low price of a competitor (R. 1386).

But when those sales at a loss were planned in advance, and not in response to a lawful competitive price, the jury was certainly not required to find good faith, and it was so instructed (R. 1386). Both Carnation and Pet budgeted or "projected" losses on frozen pies in Utah Pie's trading area (R. 397, 400-401; Pl. Exs. 7, 7A, 7B; R. 409, 1926, 2047, 2048; R. 443-445; Pl. Ex. 5; R. 446, 1656).

As for Continental, it was selling below cost *not as a manufacturer but as a middleman!* Any efficiencies in "Continental's" Watsonville plant redounded to the benefit of the owners of that plant, not Continental; Continental merely purchased pies under its label for resale

(R. 115-117; Pl. Ex. 17; R. 117, 2068; Pl. Ex. 18; R. 121, 2154).

Consequently, any efficiencies of Continental's alleged high-speed pie machine (Cont. Br. 10) are irrelevant.[2]

Furthermore, there was no possibility that increased volumes of sales would spread Continental's fixed costs in pie plant and equipment; regardless of how many pies it bought, Continental paid the costs of ingredients plus a flat $.50 per dozen for the the packer's overhead and profit (R. 767).

The most that could be said for Continental's $2.55 price was that it was slightly in excess of Continental's bare purchase price for the pies involved. With a reasonable allowance for Continental's selling expenses and overhead, there was a loss (R. 636-641).

The burden was on Continental to show that its discriminations were made in good faith to meet the equally low price of a competitor. But Continental did not produce any witness with pricing authority on frozen pies to explain how Continental's prices were arrived at. And the jury saw and heard Continental's witnesses who said that Continental's $2.85 price was the equivalent to Utah Pie's $3.10 price, as well as the contrary evidence.

On this record, the jury was not required, as a matter of law, to believe either that Continental had "met" Utah Pie's price or that it had acted in good faith.

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[2]In fact, the contract packer for Continental went broke; the margin of failure was slightly less than the value of pie cartons chewed up by the high-speed pie machine, for which Continental's packer was asserting a claim against the carton manufacturer (R. 128, 762, 764, 767).

III

THE EVIDENCE WAS MORE THAN SUFFICIENT IN LAW

Respondents have cited no authority (except the opinion of the Court of Appeals in this case, upon which they rely heavily) supporting the decision of the Court of Appeals in this case. The meaning of the evidence, and the inferences to be drawn from it, are beyond the power of the Court of Appeals to reexamine in this jury case. Whatever looser standard of review may apply in the review of FTC proceedings is inapplicable here.

And in Robinson-Patman cases, the conclusions even of the FTC should not be lightly overturned in the courts of appeal. As the Fifth Circuit recently observed in a secondary line price-discrimination case, "... the FTC's inference of probable injury has been upheld *even in the face of direct testimony by non-favored customers that the price discrimination had not resulted in injury* to their businesses." (*Foremost Dairies, Inc. v. FTC*, 348 F. 2d 674, 680 (5th Cir. 1965); emphasis added.)

Some of the decisions relied upon by respondents appear to conflict with this standard of review, and must be deemed of questionable validity at best. But all of the "authority" relied upon by respondents is distinguishable when fairly analyzed.

A. Predatory Discriminations May Endanger Competition.

Carnation relies heavily upon a book by Frederick M. Rowe to support the decision of the Court of Appeals (Carn. Br. 58, 85). Mr. Rowe, who has had some success defending Robinson-Patman cases (e.g. 335 F. 2d at 101) is also an outspoken critic of the statute. He has called

it ". . . a thirty-year old anti-chain store law, whose sloppy proscriptions today foment screwball litigation, forensic giggles, and industry-wide restraints of trade." (30 A.B.A. Antitrust Section 17 (1966).

But even Mr. Rowe would concede the sufficiency of the evidence in this case to prove Carnation's predatory intent. He says:

> "If the seller's intention to employ discriminatory pricing as a weapon to destroy competition is *not* disclosed by his express declarations, a predatory purpose may be inferred from surrounding economic circumstances, with the seller's . . . *persistent unprofitable sale 'below cost' as prime incriminating factors.*" Rowe, Price Discrimination Under the Robinson-Patman Act 146 (1962); emphasis added.)

Minneapolis-Honeywell Reg. Co. v. FTC, 191 F. 2d 786 (7th Cir. 1951), relied upon by both Carnation and Continental, bears no resemblance to this case. The challenged discriminations resulted from a system of quantity discounts which were in substantial part cost-justified (191 F. 2d at 789). The discriminations were not geographical, and there was no showing that they were aimed at any particular competitor, and no indication that even Minneapolis-Honeywell's *lowest* price was below cost. There was no scintilla of evidence of predation.

In the case at bar, there was, of course, abundant evidence of predatory intent on the part of each respondent.

B. "De Minimis" Cases Are Distinguishable.

Continental argues that Utah Pie had ". . . only a two week case" against it (Cont. Br. 45) and that a discrimination of that duration could not, as a matter of law, violate Section 2(a) (Cont. Br. 33-46).

The portion of Utah Pie's claim based upon Continental's price discriminations in the summer of 1961 cannot by any stretch of the imagination be called a "two week case." But even if Utah Pie's case against Continental were limited to those discriminatory sales, the facts clearly distinguish *Borden Co. v. FTC,* 339 F. 2d 953 (7th Cir. 1964). In *Borden,* the discrimination was for one week on a highly perishable commodity—milk—in a community of 2,500 people. The effect of the discrimination presumably lasted about one week. Borden's price-cut was made to protect its position in a market in which it was already selling, and in which a competitor had cut price within a week prior to Borden's cut. The only injury alleged was to Dean Milk Company, a large competitor, and Quality Dairy, *which got the benefit of the Borden price cut.* The cut was never repeated. The *Borden* case bears no resemblance to the case at bar.

American Oil Co. v. FTC, 325 F. 2d 101 (7th Cir. 1963) is significant mainly as a monument to the FTC's purblind approach to a serious problem. In that case, *Shell* celebrated the opening of a "Paraland" minor-brand station in Smyrna by cutting price to eliminate the major-minor brand price differential necessary to competitive equilibrium (325 F. 2d at 103). In the ensuing price war, American followed other major-brand

prices down in Smyrna, and after about 5 days also lowered its price to Seagraves, its dealer outside Smyrna on the highway to Marietta (325 F. 2d 105). It did not lower its price to five other unfavored dealers in Marietta.

The FTC did not approach this case by asking the competitively significant question "what happened to Paraland?" It did not join as respondents either Shell (whose price-cut started the price war) or the other "majors" whose prices followed it down. The *American Oil* case is best explained by the principle subsequently enunciated by the Seventh Circuit in *Universal-Rundle Corp. v. FTC*, 352 F. 2d 831 (7th Cir. 1965), cert. granted ___ U.S. ___, 35 U.S.L. Week 3124 (No. 101, 1966 term). There, the Seventh Circuit set aside an FTC order on the sole ground that the FTC should have proceeded against the rest of the industry as well as Universal-Rundle when the evidence showed that the practice of which Universal-Rundle stood accused was industry-wide.

The other explanation for *American Oil* is that there may be some sort of *de minimis* effect which does not rise to the level of a Robinson-Patman violation.

In the case at bar, by contrast, the discriminations of each respondent continued for several years. Utah Pie's estimates of injurious impact upon its business ranged as high as $741,135 (Pl. Ex. 95; R. 574, 4591). In fact, the jury assessed damages suffered by Utah Pie alone at a total of $98,468, which is hardly *de minimis* in law, however small it may look in comparison with respondents' overall sales, profits, or losses in Utah Pie's trading area.

C. Other Cases Cited by Respondents Are Distinguishable.

Anheuser-Busch, Inc. v. FTC, 289 F. 2d 835 (7th Cir. 1961) relied upon by all respondents, is equally distinguishable. In the first place, there was no indication that Anheuser's discriminatory low price was below cost. The discrimination caused no reduction in the price of any competitor, and there was no showing that any competitor lost customers (289 F. 2d at 839). Anheuser-Busch was only about twice as big as its competitors—a far cry from the thousand-to-one ratio of respondents to Utah Pie. In *Anheuser-Busch,* although there were shifts among the major competitors involved, the "all others" category actually showed a gain in market share, as against a severe loss shown by the record in this case. (Compare 289 F. 2d 839 with D. Ex. A-35; R. 1065, 5827.)

Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356 (9th Cir. 1955), relied upon by all respondents, does not aid them. The holding in the *Balian* case is that the factual findings of the trier of fact will not be disturbed on appeal. In *Balian,* those findings included an express negation of predatory intent on the part of the discriminating seller (231 F. 2d at 369). The trial court expressly found that the defendant's prices were made in good faith to meet the equally low price of a competitor (Ibid.). It also found that the defendant was selling at a *profit,* not a loss (231 F. 2d at 365.) The Ninth Circuit found that none of the findings of fact of the trial court was clearly erroneous (231 F. 2d at 364).

The destruction of a competitor is not a prerequisite to proof of competitive injury. If such destruction has

already occurred as the intended result of a predatory price discrimination, that is, of course, substantial evidence that competition has already been injured. But the statute deals in the reasonable possibility of a substantial lessening of competition or of a tendency to create a monopoly in the *future*. It is not surprising, therefore, that the actual demise of competitors has never been a *sine qua non* in primary-line price discrimination cases. See e.g. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F. 2d 661 (6th Cir. 1965), cert. denied 382 U.S. 904; *Atlas Building Prod. Co. v. Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959) cert. denied 363 U.S. 843; *Maryland Baking Co. v. FTC*, 243 F. 2d 716 (4th Cir. 1957).

D. Utah Pie Was Not Required to Prove That Respondents Had Monopoly Power in Other Areas.

Continental and Carnation make the point that Utah Pie was in no way injured *by the high prices they charged outside Utah Pie's trading area* (Carn. Br. 67; Cont. Br. 35, 47). They argue that law requires proof that the "high leg" prices caused injury, or that the "high leg" prices subsidized the "low leg" prices, or that the "high leg" prices were made possible by monopoly power in the geographic high price area.

These arguments ignore the economic realities which gave rise to the Clayton Act and which govern the reasonable interpretation of Clayton Act "incipiency" standards. Section 2 of the Clayton Act was designed to prevent the kind of predatory price cutting which goes beyond the ordinary competitive struggle sanctioned by Section 1 of the Sherman Act, tending to eliminate competition rather

than to foster it (*FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S.Ct. 1267).

The statute does not require a showing that the lower prices in Utah Pie's trading area were directly subsidized by higher prices elsewhere. In fact, all respondents were able to subsidize their below-cost discriminatory prices in Utah Pie's trading area from a much larger war chest than any which could have been amassed through sales of frozen pies (Pl. Ex. 31; R. 256, 2202). Their discriminations are thus much more dangerous in terms of probable competitive effect than regional price discriminations by even a "national" competitor engaged solely in the business of manufacturing and selling frozen pies.

The significance of the "high leg" price is that it serves as a "benchmark" from which to measure the seriousness of the price-cutting in the low price area. If the "high leg" price is a truly competitive price then discriminatory prices substantially below the "high leg" prices are rightly suspect. They would appear to be *below* a fair competitive price.[3]

Nor is there any basis for requiring that the high prices provide profits from which the lower prices can be subsidized. The significant factor is that the discriminatory

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[3]In a sense, Respondents' best defense to a claim of competitive injury in Utah Pie's trading area might have been a showing that their higher prices elsewhere were actually monopoly prices and that their discriminatory price-cutting in Utah Pie's trading brought their prices no lower than a fair competitive price. However, Respondents' position seems to be that they face vigorous competition (and presumably therefore charge competitive prices) throughout the United States. Thus Respondents' lower prices in *Utah Pie's* trading area were far *below* a fair competitive price level. Pet's program of "investment spending" may have resulted in predatory prices even in Pet's *high* price areas.

seller has the ability to set his prices in the low price area without concern for profits or losses, whereas the local seller is unable to survive except on his profits from sales in the area where, by force of his location, he must sell at a profit or perish.

To be sure, many of the old-time practitioners of regional price-cutting were large single-product firms, necessarily financing their price raids with funds from the sale of the same products at higher prices in other places. See *American Tobacco Co. v. United States*, 221 U.S. 106, 31 S.Ct. 632; *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502.

But profits in unrelated products, in the hands of a large corporation willing to sell at discriminatory, below-cost prices are weapons at least as effective as equal sums drawn from other-area profits on the same product.

E. Price Discriminations May Be Shown by Average Prices.

Pet complains that a comparison of its overall average prices in Salt Lake and elsewhere is not probative of "... the actual price at which any sale was made at any place" (Pet Br. 39).

It has been held (in cases involving only two or three sales) that price comparison for the purpose of showing price discrimination requires proof of reasonably contemporaneous sales. *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 755; 67 S.Ct. 1015, 1020; *Atlanta Trading Corp. v. FTC*, 258 F. 2d 365 (2d Cir. 1958). The reason for the rule is clear enough—times change, and seller's prices change, too. But where a definite trend of continuing discrimination can be discerned, there is no reason in

law or logic why the average level of prices should not be used as a basis for finding actionable price discriminations.

The exhibits showing Pet's average prices are Pl. Ex. 24 (R. 377, 2178) and Pl. Ex. 25 (R. 378, 2179, 2180). They show Pet's lower net sales prices in its Salt Lake division than in all Pet's other divisions for four straight years (Ibid.). They were prepared by Utah Pie's accounting witness from Pet documents (R. 246-248; see also Pl. Ex. 21; R. 235, 2161). Ruling was deferred to permit Pet counsel to examine the exhibits (R. 248). Utah Pie's accountant was subsequently cross-examined at length by Pet's counsel (R. 301-324; 328-330). The exhibits were then offered and received without objection (R. 377-378).

IV

OTHER ISSUES ARGUED BY RESPONDENTS ARE NOT BEFORE THE COURT

A. The Jury Instructions Are Not in Issue in This Court.

Respondents have disparaged the jury instructions in various ways in their briefs (Carn. Br. 38; Cont. Br. 26). Since the Court of Appeals expressly limited its decision to the sufficiency of the evidence to support a single ultimate fact, it did not rule upon the instructions (R. 1453). The correctness of the instructions is not an issue upon which certiorari was granted (Utah Pie's Petition; R. 1527). Respondents' gratuitous disparagements are apparently included mainly to discredit the jury's assessment of the evidence.

Continental complains that the trial court's jury instructions on the nature of the Section 2(a) offense were erroneous and meant "next to nothing" (Cont. Br. 26). It complains that the instructions put the emphasis upon injury to a competitor rather than injury to competition generally. (Cont. Br. 27).

This characterization of the trial court's charge to the jury is a grotesque distortion. The court made it clear that the statute was designed to protect *competition* in these words:

> "I have instructed you that price differences are not unlawful unless they are likely to cause substantial injury to *competition among sellers* of frozen pies in the Utah trading area. I have further instructed you that price differences are not unlawful so long as they make no more than due allowance for differing costs of manufacture, sale or delivery of frozen pies, or in response to changing condition affecting the market or marketability of frozen pies.
>
> "I have further instructed you that if any defendant shows that a price difference which would otherwise be unlawful was actually the result of its having sold pies at a low price in good faith to meet the equally low price of a competitor, then that would be a *complete defense*" (R. 1364; emphasis added).

As the record shows, Utah Pie was by far the most important competitor injured by respondents' discriminations, simply by virtue of its location. To have excluded from the jury's consideration the likely effect of respondents' price-cutting upon Utah Pie would have been obvious error.

The trial court did *not*, however, as Continental suggests, equate injury to Utah Pie with violation of the law. Its instructions on *damages* necessarily dealt with injury to Utah Pie, but they were prefaced by the instruction that the question of damages would not be reached unless a violation of law (including the necessary adverse effect upon competition) were first shown (R. 1357, 1363, 1397, 1398-1399).

Continental argues that the trial court's jury instructions on the "meeting competition" defense were inadequate (Cont. Br. 27-28). The argument is disingenuous in the extreme. After the jury had been instructed, in the course of taking his exceptions to the charge, Continental counsel made the following statement on the record:

> "Mr. Schafer: I think the Court was very clear on what the defenses were to the discrimination charge, and the jury would not be confused" (R. 1383).

Lest there be any doubt about the jury's keen awareness of the issues to be decided in this case, Utah Pie commends to this Court the trial court's fair, clear and correct charge to the jury (R. 1345-1373, 1385-1388, 1396-1400). Respondents' proposed instructions, by contrast, were tendentious, repetitive, argumentative, and in many instances patently erroneous (R. 1422-1446). Insofar as bits and parts of respondents' proposed instructions correctly stated the law, their substance was included in the charge as given. Most of respondents' objections to instructions are afterthoughts, anyway, and since they were not presented at the trial they may not be considered in any event. FRCP Rule 51.

Utah Pie is confident that if these cases are reversed and remanded, as they should be, for further proceedings in the Court of Appeals, the trial court's charge to the jury will then be upheld in all respects.

B. The Jury Was Not Confused.

Respondents have suggested that the jury was confused, that the trial court was unfair, and that they were railroaded (Carn. Br. 39). In fact, the jury ruled *against* Utah Pie both on the conspiracy charge and on Continental's counterclaim (R. 43, 1406). Only as to Utah Pie's price discrimination claims did the jury rule for Utah Pie (R. 41-42, 1405-1406).

Respondents' allusions to various and assorted imagined "errors" which were argued to the Court of Appeals but not passed upon are improper and should be disregarded. Respondents' innuendos about other errors are without merit. But they are simply not before this Court.

C. There Was No Misjoinder of Claims.

Carnation has argued (Br. 39, 85) that it was misjoined, that it was prejudiced by evidence of the other respondents' conduct, and that Utah Pie is seeking to "... reach the conspiracy result the jury refused to find" (Carn. Br. 85). That, of course, is an unfair statement of Utah Pie's position (see Utah Br. 80-81).

Even if Carnation had been tried separately, Utah Pie could properly have introduced evidence of the entire market situation, including the activities of each of the respondents, to show probable injury to competition. In *Standard Oil Co. of California v. United States*, 337 U.S.

293, 69 S.Ct. 1051, a Clayton Act case, this Court affirmed a judgment outlawing exclusive supply contracts with tied up independent service stations handling 6.7% of the gallonage in the market (337 U.S. at 295, 69 S.Ct. 1053). The district court and this Court relied upon a showing that the exclusive supply contracts were employed not only by Standard but by all of its major competitors (see 333 U.S. at 314, 69 S.Ct. at 1062, 78 F. Supp. at 867). On the strength of the *Standard Oil* case, similar contracts of Richfield Oil Corporation, a seller with an even smaller market share, were subsequently enjoined (*United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (S.D. Calif. 1951) affirmed 343 U.S. 922, 72 S.Ct. 665).

There was no basis for a separate trial in view of the conspiracy case which Utah Pie presented against all respondents. Although the jury did not feel that a conspiracy was proven by the preponderance of the evidence, there was more than enough in the record to permit the jury to make that determination (see R. 1248-1255).

Of course, there is no issue of misjoinder before this Court. And prejudicial misjoinder would at most have entitled Carnation to a new trial, not judgment. But, in any event, there was simply no misjoinder. See *Kelly v. Greer*, 295 F. 2d 18 (3d Cir. 1961); *Gillette Motor Transport, Inc. v. Northern Oklahoma Butane Co.*, 179 F. 2d 711 (10th Cir. 1950); *Polito v. Molasky*, 123 F. 2d 258, 262 (8th Cir. 1941), cert. denied 315 U.S. 804, 62 S.Ct. 632.

V

UTAH PIE HAS PRESERVED THE NEW TRIAL QUESTIONS

Utah Pie has briefed at length the procedural questions which this Court, in its grant of certiorari, requested it to consider (R. 1527; Utah Br. 121-140). Respondents have also briefed these questions at length (Pet Br. 102-132; Carn. Br. 30-49; Cont. Br. 50-80). Very little further need be said.

Respondents' main argument is that Utah Pie passed up opportunities to make a motion for a new trial, and may not now complain that it was not granted one (Carn. Br. 35-36; Cont. Br. 70). But as Pet recognizes, there is no need for a motion on the part of the verdict-winner in the trial court unless the court has *granted* judgment n.o.v. (Pet Br. 119). Rule 50(c)(1) clearly refers to the motion for a new trial on the part of the verdict-loser, joined with the motion for judgment n.o.v. as provided in Rule 50(b), and not to a motion by the verdict-winner.

At the time of trial, in February of 1963, Rule 50 (308 U.S. 63 (1938)) was in effect. It contained no provision whatsoever for conditional ruling upon the motion for a new trial. Thus, it cannot be said that Utah Pie failed in any way to preserve its right to a new trial during the trial court proceedings.

When this case was argued in the Court of Appeals, new Rule 50 was in effect (374 U.S. 885 (1963), effective July 1, 1963).

Utah Pie had no reason to doubt that the Court of Appeals would consider all of Utah Pie's evidence until

it saw the Court's opinion demonstrating the contrary. Although Utah Pie *could* introduce some additional evidence upon a new trial of the case, it could not complain of the erroneous exclusion of any evidence at the first trial, and therefore had no basis, prior to receipt of the Court of Appeals' opinion, for arguing its right to a new trial in the Court of Appeals.

Continental has cited *Helis v. Ward*, 308 U.S. 365, 60 S.Ct. 283 for the proposition that when a litigant petitions for re-hearing in the Court of Appeals and fails to raise an issue of this sort, it may not later raise it in the Supreme Court. But there was no petition for re-hearing in this case and respondents have cited no decision which would make a petition for re-hearing obligatory. In view of the Court of Appeals' obvious familiarity with the alternatives available to it (judgment n.o.v. on Continental's counterclaim reversed and remanded for a new trial—R. 1526), there is no reason to doubt that the Court of Appeals intended to dispose of this case exactly as it did. A petition for re-hearing would have been a futile formality.

Helis v. Ward merely holds "it is well settled that this Court confines itself to the ground upon which the writ was asked or granted, the review hearing being no broader than that sought by the petitioner" (308 U.S. at 370, 60 S.Ct. at 285). Here, the issue is clearly tendered in question 12 of Utah Pie's petition, which was granted in full (R. 1527). And, of course, the whole issue of the propriety of the Court of Appeals' ruling in the light of FRCP Rule 50 is the subject of the three additional questions specifically assigned by the Court (R. 1527).

CONCLUSION

By their re-argument of evidence favorable to themselves, respondents have demonstrated how grievously the Court of Appeals overstepped its constitutional limits in re-examining facts decided by the jury. But they have been unable to refute Utah Pie's clear showing that the evidence and inferences *favorable to Utah Pie* more than adequately supported the jury's verdicts under the law as enunciated in many decisions of this Court. For the reasons stated above, and in Utah Pie's opening brief, the judgment of the Court of Appeals should be reversed and Utah Pie granted the relief prayed for at the conclusion of its opening brief.

Dated, December 22, 1966.

Respectfully submitted,

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